

E-FILED ON 02/13/2007

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ROBERT SCHMIDT and THOMAS WALSH,
Plaintiffs,
v.
LEVI STRAUSS & CO., LAURA LIANG and
DOES 1-50,
Defendants.

No. C04-01026 RMW (HRL)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO COMPEL PRODUCTION
OF DOCUMENTS**

[Re: Docket No. 90]

RELATED COUNTER-ACTION

This is an action brought under the Sarbanes-Oxley Act, 18 U.S.C. § 1541A. Plaintiffs Robert Schmidt and Thomas Walsh are former employees of defendant Levi Strauss & Co. ("LS&Co.") who worked under the supervision of defendant Laura Liang. They claim that they were wrongfully terminated in retaliation for filing complaints about defendants' alleged tax fraud and other accounting irregularities. They also allege that defendants defamed them. Defendants contend that plaintiffs were fired for insubordination and work performance issues.

Before filing the instant action, plaintiffs filed a similar wrongful termination lawsuit in San Francisco Superior Court, alleging violations of state common law and statutes. The parties exchanged some discovery there. Later, they stipulated to stay the state court case while they litigate the defamation and Sarbanes-Oxley claims here.

1 On January 30, 2007, this court heard the “Motion to Compel Production of Documents
2 and Further Production of Documents” filed by plaintiffs. LS&Co. opposed the motion; and, at
3 this court’s direction, LS&Co. subsequently submitted certain documents for an *in camera*
4 review. Upon consideration of the papers filed by the parties, as well as the arguments of
5 counsel, this court grants the motion in part and denies the motion in part.

6 **1. Moot Issues**

7 The parties reached agreement as to (a) draft written improvement notices and
8 termination notices and (b) business plan and presentation documents. Accordingly, plaintiffs’
9 motion to compel these documents is DENIED as MOOT.

10 **2. Defendant Laura Liang’s Personnel File**

11 LS&Co. has produced documents from defendant Laura Liang’s personnel file.
12 However, plaintiffs assert that the production is “spotty” and that several categories of
13 documents are missing from the production, including: Liang’s self-assessments; documents
14 concerning her 2001 promotion from Director to Vice President; documents concerning her
15 work, duties and awards for 1999; the second page of a two-page performance evaluation in
16 2003 by LS&Co.’s former Chief Financial Officer, Bill Chiasson; and other records which
17 LS&Co.’s documents indicate are created in the normal course of employment with the
18 company. Plaintiffs assert that LS&Co. should have Liang’s complete personnel file because it
19 is legally required to maintain it. Further, they express concern that LS&Co.’s search for
20 Liang’s personnel documents was haphazard and less than thorough because the document
21 production was made in piecemeal fashion over four different points in time.

22 LS&Co.’s counsel avers that LS&Co. has produced all of Liang’s personnel documents
23 that LS&Co. has been able to locate after a diligent search. (See Schwing Decl., ¶ 3). At oral
24 argument, defense counsel stated that LS&Co.’s legal department conducted the document
25 search in consultation with the human resources department and, possibly, Liang herself. As for
26 the performance review by Chiasson, defense counsel asserted that Chiasson’s deposition
27 testimony indicates that there was no second page because he did not prepare the document in a
28 normal review situation (i.e., the review in question reportedly was provided by Chiasson two

1 weeks after his employment at LS&Co. was terminated). Further, defense counsel confirmed
2 that defendants are not “hiding” documents.

3 Based on defense counsel’s representations to the court, it appears that there are no
4 further documents to compel. Nonetheless, this court will grant plaintiffs’ motion to the
5 following extent: **No later than February 23, 2007**, defendants shall serve declaration(s) from
6 appropriate person(s) within LS&Co. (i.e., not defense counsel) which (a) detail the search
7 (what, where and who) that was conducted for Liang’s personnel file; (b) confirm that
8 defendants have searched for Liang’s personnel documents in all locations where they might
9 reasonably be found; and (c) confirm that all responsive documents which were located have
10 been produced and that no documents have been withheld.

11 **3. Minutes of Tax Leadership Team Meetings**

12 During their employment at LS&Co., plaintiffs were members of the tax leadership
13 team, which met on a monthly basis. Plaintiffs assert that although LS&Co. produced the
14 “rough” minutes from those meetings, it refuses to produce the “final” version of those minutes.
15 The parties vigorously dispute whether the “final” version of the minutes fall within (a) their
16 prior stipulation as to the use of discovery from their state court action; or (b) their agreement to
17 conduct limited additional written discovery through February 15, 2007 (notwithstanding that
18 discovery closed in this case on September 15, 2006). In any event, LS&Co. maintains that
19 plaintiffs have drawn an inappropriate distinction between “rough” and “final” minutes. At the
20 motion hearing, defense counsel asserted that minutes were kept sporadically and that there may
21 be one or two instances where changes may have been made to an initial version. However,
22 LS&Co. says that it has not withheld any version(s) of minutes which have been produced in
23 this action.

24 There is no dispute that, in their state court lawsuit, plaintiffs served a formal request
25 calling for the tax leadership meeting minutes. (See Ainley Decl., Ex. D (Request No. 494: “All
26 LS&Co. Tax Department Leadership Team Meeting Minutes for all meetings during and after
27 fiscal year 1999 to the present.”)). However, plaintiffs have not pointed to any discovery
28 request propounded in the instant action which calls for the production of the tax leadership

1 meeting minutes themselves; and, LS&Co. says that the minutes which have been produced
2 here were produced because they are responsive to plaintiffs' requests for other categories of
3 documents.

4 Plaintiffs nevertheless argue that the parties agreed that all discovery *propounded* in the
5 state court action could be used in the instant lawsuit. LS&Co. contends that the parties agreed
6 only that those documents which had been produced and depositions which had been taken in
7 the state court lawsuit could be used here. Further, it says that (1) there was no agreement that
8 defendants would be obliged to respond here to all of plaintiffs' requests served in the state
9 court action; and (2) plaintiffs' counsel indicated that he did not want defendants to respond to
10 the discovery requests which had been propounded in the state court lawsuit. The record
11 presented indeed appears to corroborate LS&Co.'s version of events (see Ainley Decl., Ex. E;
12 see also Schwing Decl., ¶¶ 2, 8, 9, Exs. C and D).

13 Nor is this court persuaded that the "final" minutes which are now being sought fall
14 within the parties' agreement to conduct limited post-cutoff discovery through February 15,
15 2007. Although there appears to be some dispute over the specific terms of the parties'
16 agreement, they have essentially agreed that no further written discovery will be taken except as
17 follows:

18 To the extent a deponent in a deposition identifies a particular
19 document or readily identifiable and limited category of
20 documents that have not been produced in the case and were
21 not previously known to a requesting party, the requesting party
22 may request those documents or category of documents. The
23 requests shall not be broad, open-ended document requests
(e.g., "all documents relating to X subject"), but rather shall be
tailored to the particular document or readily identifiable and
limited category of documents referenced or identified during
the deposition. These requests will be considered on a case by
case basis.

24 (Scheduling Order, Docket No. 89 at 2:26-3:5). (Defendants' version of the parties' agreement
25 is the same, except that they contend that the exception applies only to those documents
26 identified in a deposition conducted after August 16, 2006). (*Id.*). Here, plaintiffs and their
27 counsel certainly have been aware of the existence of the minutes (generally) for quite some
28 time.

1 At the same time, however, plaintiffs say that they were not previously aware that
2 “final” versions of minutes exist which might differ from the original minutes until the October
3 26, 2006 deposition of Denise Cahalan. Moreover, the record before this court indicates that
4 Cahalan was unable to answer certain questions because she did not know whether she had the
5 “final” versions of minutes before her. (See Ainley Reply Decl., Ex. C (Cahalan Depo. at pp.
6 254-55)).

7 Accordingly, this court will grant plaintiffs’ motion, but only to the following extent:
8 **No later than February 23, 2007**, LS&Co. shall produce all versions and iterations of the
9 minutes which have been produced to plaintiffs in this action. If all such documents have
10 already been produced (or if multiple versions of them do not exist), then LS&Co. shall serve,
11 **no later than February 23, 2007**, declaration(s) from appropriate person(s) within the
12 company so attesting. Plaintiffs’ motion is otherwise denied.

13 **4. Unredacted Version of Nancy Handa’s Notes**

14 Nancy Handa is a human resources manager at LS&Co. During her deposition, LS&Co.
15 voluntarily produced certain notes authored by Handa that had been used to prepare her for
16 deposition. However, LS&Co. redacted Handa’s notes of her June 19, 2002 and September 13,
17 2002 conversations with LS&Co.’s in-house counsel, Tracey Preston. LS&Co. says that those
18 notes were not used to prepare Handa for deposition and are protected by the attorney-client
19 privilege. Plaintiffs now move for an order compelling LS&Co. to produce them.

20 Preliminarily, LS&Co. argues that the motion should be denied because plaintiffs never
21 served a document request for the notes in the instant action. However, this court finds that
22 plaintiffs are entitled to test the asserted privilege over the redacted material. Having
23 voluntarily produced the notes (in redacted form), LS&Co., in effect, opened the door to
24 plaintiffs’ inquiry as to what was redacted and why.

25 LS&Co. nevertheless maintains that the notes are exempt from disclosure under the
26 attorney-client privilege. The attorney-client privilege applies “(1) [w]hen legal advice of any
27 kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the
28 communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the

1 client's instance, permanently protected (7) from disclosure by the client or by the legal adviser
2 (8) unless the protection be waived." United States v. Martin, 278 F.3d 988, 999-1000 (9th Cir.
3 2002). The party asserting the privilege has the burden of establishing that the privilege
4 applies. "Because the attorney-client privilege has the effect of withholding relevant
5 information from the factfinder, it is applied only when necessary to achieve its limited purpose
6 of encouraging full and frank disclosure by the client to his or her attorney." Clarke v.
7 American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992). Here, LS&Co. contends
8 that the notes in question are privileged because they memorialize confidential communications
9 between Handa and Preston in which Handa sought legal advice from Preston on issues
10 concerning plaintiffs' employment.

11 Plaintiffs argue that there can be no privilege over the notes because Preston assisted in
12 the preparation of a written warning which was issued to plaintiff Walsh on July 8, 2002. Here,
13 their motion is based upon the apparent theory that the redacted notes pertain to that written
14 notice. As such, plaintiffs contend that (a) Preston was acting primarily as a business (not legal)
15 advisor on a human resources action; and (b) even if the privilege applies, it has been waived
16 because the written warning eventually was disclosed to Walsh after an investigation.

17 However, based upon its *in camera* review, this court finds that the redacted notes do
18 not appear to discuss or even mention the written warning notice. Indeed, as LS&Co. points
19 out, the September 13, 2002 conversation took place several months after the notice had been
20 issued. Moreover, unlike Neuder v. Battelle Pacific Northwest Nat'l Lab., 194 F.R.D. 289
21 (D.D.C. 2000), cited by plaintiffs, the factual record before this court does not indicate that
22 Preston was acting as a business advisor when she met with Handa. Here, there is nothing in
23 the redacted notes indicating that business (as opposed to legal) advice was being requested or
24 provided. Further, Preston attests that she has never served as a business advisor during her
25 employment at LS&Co. (see Preston Decl., ¶ 2).

26 Plaintiffs nevertheless maintain that insofar as the written warning was issued to Walsh
27 after an investigation, they are entitled to access the entire record of that investigation,
28 including Handa's notes. Here, they rely upon several cases in which a party was found to have

waived the privilege when it placed the advice of its counsel or the adequacy of its internal investigations at issue in the litigation. See Sharper Image Corp. v. Honeywell Int'l, Inc., 222 F.R.D. 621 (N.D. Cal. 2004) (concluding in a patent infringement action that defendant waived the privilege as to pre-litigation communications concerning patent infringement where defendant relied upon the advice of its counsel on infringement issues); Peterson v. Wallace Computer Servs., Inc., 984 F. Supp. 821 (D. Vt. 1997) (concluding in an employment discrimination case that the defendant-employer waived the privilege by raising the defense that it conducted an adequate investigation into plaintiff's claims of harassment). These cases are distinguishable, however. Here, LS&Co. says that it does not intend to rely upon the advice of its counsel – and, specifically, not upon Preston's conversations with Handa – to defend itself in the instant lawsuit.

Nonetheless, plaintiffs argue that Handa's notes fall within LS&Co.'s express waiver of the attorney-client privilege on certain tax issues. LS&Co. has indeed affirmatively waived the attorney-client privilege and work product protection as to certain tax-related issues, namely:

LSLA, Finserv, foreign tax credits, deferred tax assets, check-the-box elections, bad debt and worthless stock transactions, and Internal Revenue Code 956.

(See Schwing Decl., Ex. K). However, LS&Co. qualified its waiver as follows:

- the waiver as to deferred tax assets is limited to foreign tax credits;
- with respect to LSLA, the privilege is waived “only as to the legitimacy of the historical tax treatment of LSLA through 2002”;
- with respect to Internal Revenue Code Section 956, the waiver is limited to “information relating to Finserv”; and
- for check-the-box elections, bad debt and worthless stock transactions, the waiver is limited to the following entities: Finserv, LS India, LS Mauritius, LS Asia, LS Taiwan, LS APD, LS Indonesia and LS France.

(Id.). Further, LS&Co. stated that it was not waiving the privilege or work product protection as to:

privileged communications to or from or work product created by its lawyers or their agents in defending against the allegations

1 raised by Schmidt and Walsh in any complaint filed with a court of
2 law or agency or testimony before the United States government,
3 regardless of whether the communications or work product related
4 to LSLA, Finserv, foreign tax credits, deferred tax assets,
5 check-the-box elections, bad debt and worthless stock transactions,
6 Internal Revenue Code Section 956, and/or any other issue.

7 (Id.). In essence, plaintiffs assert that LS&Co.'s waiver necessarily extends to any discussions
8 concerning their employment insofar as LS&Co. claims to have fired them for their work on
9 these same tax issues. LS&Co. contends that its waiver is limited solely to substantive tax
10 issues in the case and does not encompass any employment issues.

11 Based on the record before it, the court finds that LS&Co. has legitimately asserted the
12 attorney-client privilege over the notes in question. The redacted notes appear to corroborate
13 LS&Co.'s claim that they comprise confidential communications between Handa and Preston
14 made to secure legal advice about issues concerning plaintiffs' employment. (See Preston
15 Decl., ¶¶ 3-4). The notes do not discuss the substantive tax issues which are the subject of
16 LS&Co.'s waiver, and this court finds that they do not fall within the scope of that waiver.

17 Accordingly, plaintiffs' motion to compel the production of Handa's redacted notes is
18 DENIED.

19 IT IS SO ORDERED.

20 Dated: February 13, 2007

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HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

5:04-cv-1026 Notice will be electronically mailed to:

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